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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AERONAUTICAL MACHINISTS LODGE 709, IAM&AW, AFL-CIO,

Petitioner,

v.

LOCKHEED GEORGIA COMPANY, DIVISION OF LOCKHEED CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals that the District Courts may not set aside arbitration awards which fail to enforce a contract in accordance with its plain terms and which add implied contractual provisions in violation of express contractual prohibitions is inconsistent with decisions of this Court and of other Circuit Courts.**

II. Whether, when a District Court has twice found that the arbitrator was not faithful to his obligation and arbitration has twice been exhausted, the District Court may enforce the plain terms of the contract and afford a remedy to the Union.**

III. Whether the standard for award of attorney fees announced by the Circuit Court conflicts with decisions of this Court.

**Certiorari has been granted upon these issues in a reverse context in *W. R. Grace & Co. v. Rubber Workers Union*, 652 F.2d 1248 (5th Cir., Unit A, 1981) certiorari granted, No. 81-1314, June 28, 1982.

LIST OF PARTIES

The only parties to this proceeding in the Court of Appeals are those named in the caption; however, because of the wording of Eleventh Circuit Rules, Lockheed-Georgia Company filed a list of all Lockheed Corporation subsidiaries and affiliates with the Eleventh Circuit as being interested in the outcome of the case.

The International Association of Machinists and Aerospace Workers, AFL-CIO, is interested in the proceeding because of its contractual relationships with the Lockheed Corporation and its subsidiaries, but it is not a party to this case.

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709, IAM&AW, AFL-CIO,
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LOCKHEED-GEORGIA COMPANY,
DIVISION OF LOCKHEED CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Aeronautical Machinists Lodge 709, IAM&AW, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Aeronautical Machinists Lodge 709, IAM&AW v. Lockheed Georgia Company*, issued as mandate on November 3, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals and the three opinions of the District Court, with one exception, are unpublished.* The three opinions and orders of the Dis-

*The opinion of the District Court entered on September 11, 1981 (App. G) is published at 521 F. Supp. 1327.

trict Court are reprinted in the separate Appendix hereto as Appendices E (1e-6e), G (1g-9g), and H (1h-2h). The opinion of the Court of Appeals is reprinted as Appendix A (1a-12a) in the separate Appendix.

JURISDICTION

The Court of Appeals entered judgment on July 21, 1982. Appendix O (1o-2o). Timely petition for rehearing was denied on September 14, 1982. Appendix L (1l-2l). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254 (1).

STATUTES AND RULE INVOLVED

The pertinent parts of Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, and of Rule 52(a), F. R. Civ. P. are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

Machinists Lodge 709 brought this action in the Northern District of Georgia to set aside the award of an Arbitrator which it believed to depart from the plain terms of the collective bargaining agreement and which "administered his own brand of industrial justice" contrary to the dictates of this Court in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1970). The Arbitrator's Award (App. B, 1b-9b) upheld the action of Lockheed which barred a Union Business Representative (R. P. Mason) from access to all Lockheed controlled premises. See Grievance in Appendix P (1p).

The complaint prayed that the award of the Arbitrator

be set aside, that a new arbitration be ordered "or that plaintiff's grievance be upheld by the Court, and for such other relief as may be proper." (Appendix C, 1c, 3c-4c). Lockheed countered with a cross action to enforce the award and for attorney fees (Appendix D, 1d-7d).

The District Court set aside the Arbitration Award and remanded the case to the Arbitrator for further consideration in accordance with its opinion. (Appendix E, 1e-6e).

On remand the Arbitrator reaffirmed his previous decision, contrary to the opinion and instructions of the District Court (Appendix F, 1f-5f). Lodge 709 objected to the Supplemental Award and asked that it be vacated and set aside because the Arbitrator had again failed to uphold the plain terms of the Agreement and had again administered his own brand of industrial justice. In its objections to the Supplemental Award, the Union asked for affirmative relief.

The Court again set aside the Arbitrator's award but failed to grant affirmative relief. (Appendix G, 1g-9g). Lodge 709 then filed a motion that the Court's opinion and order be amended to grant affirmative relief and direct Lockheed to permit access to its premises by Business Representative Mason.

The District Court held that it did not have authority to enforce the provisions of the collective bargaining agreement. (Appendix H, 1h-2h).

Lockheed appealed from the judgment setting aside the Arbitrator's supplemental award and the Union appealed from the denial of affirmative relief.

On appeal the Fifth Circuit reversed the District Court on Lockheed's appeal but affirmed the denial of relief to the Union. (Appendix A, 1a-12a).

STATEMENT OF FACTS

The collective bargaining agreement between Lockheed-Georgia Company and Lodge 709 provides that:

> Section 2—Union Officials and Business Representatives
>
> The President, Vice-President and Business Representatives of the Union shall have access to the Labor Relations Department Office for the purpose of contracting Labor Relations personnel *and shall have access to the departments of the Company's plant to which they are assigned* for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. *The Company shall not impose regulations which will render ineffective the purposes of this Section.* Before entering the Company's plant for the above purpose, the President, Vice-President, or a Business Representative shall notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact.
>
> The President, Vice-President or Business Representative shall not discuss any problem with employees (other than the Steward and Committeeman) or with the supervision of any department. (Contract, Part B, Art. II, Sec. 2, emphasis supplied; Appendix Q, 1q-2q).

Business Representative Mason became involved in a dispute with a department manager while on Lockheed premises. Lockheed contended that Mason had assaulted a supervisor in the manager's office, which Mason denied.

Rather than file a grievance that Mason had violated the contract (last paragraph quoted above). Lockheed barred Mason from all access to its premises. Notwith-

standing its vast personnel and security resources, Lockheed took no intermediate action, nor promulgated any intermediate "regulations" but elected to bar Mason altogether from all "Lockheed controlled property."[1]

The Union filed a grievance (App. P) asserting that Lockheed had violated the above quoted provisions by barring Mason altogether from Lockheed premises, thereby preventing him from performing his assigned duties, rather than adopt reasonable intermediate regulations to prevent the alleged, and denied, abuse of management personnel.

The Arbitrator ruled in favor of Lockheed finding an implied "rule of reasonableness" which was "implicit" but was *not* written or stated anywhere in the collective bargaining agreement. (Appendix B, 8b-9b).[2]

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[1] As found by the District Court (Appendix G, 6g-7g), Union President Reeves Bowen testified in the arbitration proceedings, *without any contradiction*, that: "A sizeable portion of our relationship with the Company is confrontation." [Arb. Transcript, Vol. II, page 102.] "A lot of it is trench warfare." [Arb. Transcript, Vol. II, p. 102. "It's rare that a month goes by without [the Company contacting] me with a claim of misconduct * * * they have a very high rate of complaints on business representatives. * * * they have a stack of paperwork on [Business Representative John Kendrick] * * * about that high (indicating), maybe a foot off the table. * * * Also, they have mentioned that they have a stack of paperwork on [Business Representative] Gerald Brown * * * so high (indicating) * * * six inches off the table. * * * they claim we've made complaints to them about business representatives being bumped around by management people. * * * We've made complaints about abuse, more often the people we represent and the business representatives themselves, of course. * * * I've been threatened more than once with having the guard walk me out." [Arb. Transcript, Vol. II, pp. 100-101].

[2] The Union's grievance was *not* a grievance involving the issue of "proper cause" for discipline which would have given the arbitrator a broad discretion, but was designed to uphold the specific contractual guaranty of plant access for employee representation. See Grievance, Appendix Q.

The collective bargaining agreement, on the other hand, provides explicitly that:

> The Arbitrator *shall not* have the authority to amend or modify this Agreement or to establish new terms and and conditions of this Agreement.

Part B, Article III, Section 5; App. Q, 4q-5q).

In its first opinion, the District Court found and ruled:

> This Court may also consider whether an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement:
>
> > [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *United Steelworkers v. Enterprise Wheel and Car Corp., supra,* at 597.
>
> An arbitrator may not go beyond interpretation and application of the collective bargaining agreement. *Communication Workers v. Western Electric Co., Inc.,* supra.[3]
>
> The issue which the parties presented to the arbitrator was whether the Company violated the collective bargaining agreement by permanently barring Mr. Mason from all Lockheed controlled property. The award and opinion indicate that the arbitrator's concern was whether the Company's bar against Mr. Mason's presence on its property was justified. The

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[3] *Communications Workers of America v. Western Electric Co., Inc.,* 558 F.2d 876 (5th Cir. 1977), aff'g 397 F.Supp. 1318 (N.D. Ga. 1975).

arbitrator appeared to conclude that if the action was justified it was not a violation of the agreement, and he found that a rule of reasonableness must be used to interpret and apply the provisions of the collective bargaining agreement. His final determination was that the Company's action 'was justified by [Mr. Mason's] misconduct and did not violate the Agreement.'

It appears to this Court that the arbitrator went beyond the issue submitted to him in making his determination. The issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property. It was instead whether the Company's action rendered ineffective the purposes of the provision of the collective bargaining agreement which allowed Mr. Mason access to property of the Company for the purpose of performing his job as business representative (hereinafter referred to as 'the business representative provision'). If the arbitrator had found that the Company's action did render ineffective the purposes of that provision, he would have been required to conclude that the Company violated the agreement according to its terms, no matter how justified he might have found that violation to be. The parties have agreed that the Company *shall not* render ineffective the purposes of the business representative provision. *See Communication Workers v. Western Electric Co., Inc., supra.*

The arbitrator noted that Mr. Mason's ability to fully perform his job as a business representative has been hampered to some degree by his lack of access to the plant, but this Court feels that the opinion does not focus on whether the Company's action *renders ineffective* the business representative provision in violation of the agreement. Accordingly, this matter is REMANDED to the arbitrator for clarification or for additional findings on that issue.

After "complete review of this matter" on remand, the Arbitrator reiterated his earlier holding notwithstanding the admonitions of the District Court. He said:

> While not explicitly stated in Article II, Section 2 of the Agreement, it is *implicit* in those provisions that the right of access granted to Union Business Representatives is contingent upon their conducting themselves in a manner which is consistent with the purposes for which access has been granted, * * * (emphasis supplied, (Appendix F, 3f).
>
> * * *
>
> As it relates to this matter, the purpose of Article II, Section 2 of the Agreement is to facilitate the Business Representatives' performance of specified duties by allowing them access to the Labor Relations Department Office and their assigned plant department for the performance of specified tasks. *The Company's action rendered the purpose ineffective as to Mason*, as an individual Business Representative, but the general purpose of the provision was not rendered ineffective when Mason was barred since all other Business Representatives continued to have access to the plant. Article II, Section 2 specifically provides that the Company may regulate visits by Business Representatives to the Labor Relations Department Office and their assigned departments and that the 'Company shall not impose regulations which will render ineffective the purpose of this Section.' The 'regulations' provided for refer to rules or restrictions on the manner in which plant visits are to be made. By barring Mason from Company premises, the Company did not regulate *visits* made under Article II, Section 2, but rescinded Mason's *right* to access and the Union's right to have Mason granted access to plant premises, based on the implicit contractual authority which arose from Mason's persistent and outrageous breach of the obligation for proper conduct. Thus, the bar to Mason's entry was not a regulation on plant visits which rendered the purpose of Article II, Section 2 ineffective, and the Company

did not violate Article II, Section 2 by imposing the bar. (Id., 4f-5f, emphasis supplied.)

Upon the Union's Objections to Confirmation of the Arbitrator's Supplemental Opinion, the District Court held:

> However, the courts have fashioned a few exceptions to the finality of arbitration awards. In *Enterprise Wheel, supra,* the Supreme Court stated that the arbitration award 'is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' 363 U.S. at 597. Thus, a court may consider whether, as this Court did in its Order of June 30, 1980, an arbitrator has exceeded the authority conferred upon him by a collective bargaining agreement. *Western Electric, supra.* In the case at bar, the parties' collective bargaining agreement provides, *inter alia,* that '[t]he arbitrator shall not have the authority to amend or modify [the agreement] or to establish new terms and conditions . . .' Agreement at Art. III, Sec. 5.
>
> On remand, the arbitrator found the Company's bar of Mr. Mason not to have rendered ineffective the purpose of Art. II, Sec. 2 because other business representatives continued to have access to the Company's premises. However, this holding is premised on his earlier determination that the Company did not violate Art. II, Sec. 2 because it was justified in 'rescind[ing] the right to access as it applied to Mason . . . ' Supplemental Award at p. 5. This analysis is in direct contravention of this Court's earlier ruling that '[t]he issue which was before the arbitrator was not whether the Company was justified in barring Mr. Mason from its property.' In other words, the arbitrator should have considered whether Art. II, Sec. 2 gives the Company the right to bar access to its premises to a business representative, without regard to the arguments the Company might put forth to justify its action.

The Court recognizes the Company's legitimate interests in protecting its personnel from physical attacks and its operations from disruptive behavior. However much this Court might sympathize with this feeling [, that the Company's action was justified,] the arbitrator 'does not sit to dispense his own brand of industrial justice.' *Western Electric, supra,* at 1323. His authority was limited to deciding the issues submitted to him. Thus, in considering whether the Company was justified in its action he went beyond his authority and this Court has no choice but to refuse enforcement of the award. *Enterprise Wheel, supra,* at 597; *Western Electric, supra,* at 1323.

The Court notes that Art. II, Sec. 2 gives the Company the authority to make rules to govern the right of access by Union personnel. Therefore, it cannot be said that the Company is left without a remedy. It can adopt regulations to protect its legitimate concerns by providing for lesser sanctions than a bar, thereby also safeguarding the Union's right of access. In this regard, the Court finds the arbitrator's holding that by barring Mr. Mason the Company did not regulate his right of access to the premises to be 'without foundation in reason or fact.' *Machinists District No. 145 v. Modern Air Transport, Inc.*, 495 F.2d 1241, 1244 (5th Cir.), *cert. denied* 419 U.S. 1050 (1974); *Boise Cascade v. United Steelworkers*, 588 F.2d 127 (5th Cir.), *cert. denied*, — U.S. ——, 100 S.Ct. 57 (1979). Common sense dictates that the withdrawal of the right of access is the ultimate regulation of access.

In *Boise Cascade, supra,* at 129-30, the Court held that an arbitrator can consider extrinsic evidence 'to explain an agreement that may rationally be considered ambiguous.' In that case the arbitrator made a finding that the agreement was ambiguous; thus, requiring extrinsic evidence such as the practices of the industry and the shop. *Id.* To the contrary, in this case, the arbitrator made no finding of ambiguity. Therefore, his duty was to interpret the express language of Art.

II, Sec. 2, which states that '[*b*]*usiness* [*r*]*epresentatives* . . . *shall have access* to the' Company's premises, without reliance on extraneous evidence.

Notwithstanding the clear contractual language, the arbitrator held that Mr. Mason 'breached the *implicit* obligation for proper conduct, upon which the right of access . . . is contingent . . . ' Supplemental Award at p. 4. To make this finding, the arbitrator impermissibly added terms which the parties did not place in the contract. Defendant argues this departure by the arbitrator from the plain terms of the contract is the classic 'law of the shop' contractual analysis. However, that argument fails where there has been no finding of ambiguous language on the part of the artitrator. Furthermore, assuming that evidence of prior custom and practice between the parties was admissible, the record shows a stormy relationship and excessive conduct by representatives of both parties, which had been tolerated (albeit with many mutual protestations) by the parties for many years. *See* Transcript of Arbitration Proceeding, Vol. II, at pp. 100-102.

In conclusion, even if the arbitrator were allowed to consider extraneous evidence, the custom and practice of the plant and the law of the shop did not show a regular practice of ousting business representatives from the premises for excessive behavior. To the contrary, it showed toleration and even condonation of excessive behavior by both parties over the years. (Appendix G, 4g-7g).[4]

* * *

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[4] Irrespective of whether an ambiguity must exist in a contract before the "law of the shop" may be considered by an arbitrator, the arbitrator in this case *did not* rely upon the "law of the shop" in making his decisions and the District Court expressly and properly so found. As the District Court found, the only relevant evidence of custom and practice at Lockheed shown in the evidence before the arbitrator was evidence of a long history of condonation of excessive conduct by both parties and there was no evidence that there was a

> . . . In the case at bar, the language in Art. II, Sec. 2 makes it clear business representatives shall have access and that any regulations are not to defeat this right of access. Given the absence of any regulations prior to this action, the arbitrator could not *ex post facto* imply such a regulation which clearly defeats the right of access. A proper regulation might provide for a lesser sanction than a total bar of Mr. Mason in this case. (App. G, 7g-8g).

The District Court therefore vacated the Arbitrator's awards (App. G, 9g); but the Court denied the express request of the Union for a court order enforcing the clear terms of the agreement on the basis that the Court did not have authority to enforce the Agreement and grant affirmative relief. (App. H, 1h-2h).

The Court of Appeals reversed the order vacating the awards but affirmed the denial of affirmative relief. (App. A, 11a-12a).[5]

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regular practice of ousting Business Representatives from the premises. This Court has defined the "law of the shop" as the customs and practices of the parties under the contract. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-582 (1970). Custom and practice which reveals the "law of the shop" must be shown in evidence before it can be devined or found to exist by an arbitrator. The District Court properly so held, and the ruling of the Court of Appeals (App. A, 8a-9a) that the arbitrator may devine "the law of the shop" out of the ether without evidence upon which to base a finding of "law of the shop" (here non-existent) grants unlimited authorization to arbitrators to *make* contracts which differ from the agreement written by the parties. In the long term such can only result in undermining confidence in the arbitration process. This ruling of the Circuit Court in improperly reversing the findings of the District Court defies the spirit, if not the letter, of FRCP 52(a).

[5] In *Loveless v. Eastern Air Lines*, 681 F.2d 1272, 1278 (11th Cir., 1982), another panel of the Eleventh Circuit cited the District Court's September 11, 1981, decision in this case with apparent approval, recognizing that where the collective bargaining agreement prohibits an arbitrator from amending, modifying or adding new terms or conditions to the agreement, as here, the authority of the arbitrator is

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of This Court and With Precedent in Other Circuits.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), this Court held:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look to guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award. (363 U.S. at 597.)

The Fifth Circuit has consistently recognized the limitations upon an arbitrator's authority, even in those cases in which it has enforced an award which had been rendered pursuant to a broad arbitration clause containing no restrictions upon the arbitrator's authority. See, e.g., *Machinists District No. 145 v. Modern Air Transp., Inc.*, 495 F.2d 1241, 1244 (5th Cir.), cert. den. 419 U.S. 1052 (1974); *United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 731 (5th Cir.), cert. den. 419 U.S. 998 (1974). And in *Brotherhood of Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), cert. den. 396 U.S. 1008 (1970), the Fifth Circuit restated the limitations upon an arbitrator's power, as follows:

> The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his au-

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limited to the interpretation and application of the agreement as written by the parties. The decision of the Eleventh Circuit panel in this case, rendered per curiam, without oral argument and unpublished, disregards the distinctions as to the authority of an arbitrator which were carefully drawn in the *Loveless* decision.

thority. When he is no longer carrying out the agreement or when his position cannot be considered in anyway rational, he has exceeded his jurisdiction. 415 F.2d, at 412.

See also *Lodge No. 12, etc., v. Cameron Iron Works*, 292 F.2d 112, 118 (5th Cir.), cert. den. 368 U.S. 926 (1961), where the Court said: 'Of course this does not turn the arbiter loose.'

While there have been many decisions in other circuits finding a disregard of their obligation by arbitrators (some of which are cited *infra*), the first of such cases in the Fifth Circuit was decided in 1977, and, as it happens, counsel for Lockheed in this case were the attorneys who there asserted that the arbitrator had demonstrated an infidelity to the agreement of the parties.

In that case, *Communications Workers of America v. Western Electric Co., Inc.*, 558 F.2d 816 (5th Cir. 1977), the Court said: "The district court's decision not to enforce the arbitrator's award was correct, for the reasons set forth in the Order Directing that Judgment Be Entered For the Defendant, published at 397 F.Supp. 1318."

In that Order, Judge James Hill, now of the Eleventh Circuit, said:

> The Court must then look to the words of the arbitrator and determine if his award 'draws its essence from the collective bargaining agreement.' *Enterprise Corp., supra*, at 597.
>
> * * *
>
> However, the Court is of the opinion that the manifest words of the arbitrator clearly show that he did not confine himself to interpretation and application of the collective bargaining agreement, but instead took it upon himself to dispense his own brand of

> industrial justice. Therefore, the enforcement of the award must be denied.
>
> * * * Where the provisions of a collective bargaining agreement are not in clear, plain, exact and unambiguous terms, an arbitrator has wide latitude in interpreting the agreement. [Citations omitted.] However, in the instant case the provisions of the agreement could hardly be more clear.

Similarly, in *Alabama Education Association v. Alabama Professional Staff Org.*, 655 F.2d 607, 609 (5th Cir., Unit B, 1981), the Court said:

> On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' *Safeway Stores v. American Bakery and Confectionery Workers International Union, Local 111, supra.*[6]

And as Chief Judge Brown said in *United States Gypsum Co. v. United Steelworkers of America*, 384 F.2d 38, 48 (5th Cir. 1967), *cert. den.* 88 S.Ct. 783:

> * * * these * * * are matters which may be controlled, fully or in part, in the Court review of any enforcement proceedings especially as to the extent to which the award grants * * * relief of a kind possibly involving illegal recognition.

Thus the Fifth Circuit, and the Eleventh Circuit until now, have recognized that federal courts have the power *and responsibility* under Section 301 to review arbitration awards to assure that the arbitrator is faithful to his obligation and that his award complies with the agreement of the parties.

The other circuit courts and district courts in many, many cases have also held that an arbitrator exhibits an

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[6] 390 F.2d 79 (5th Cir. 1968).

infidelity to his obligation if he departs from the plain language of the contract between the parties. For example, in *Monongahela Power Co. v. Electrical Workers Union*, 556 F.2d 1196 (4th Cir. 1976), the contract provided that "the Company shall have the unqualified right to discharge or discipline any or all employees who engage in [a breach of the no-strike clause]." The contract there, *as here*, also provided that the arbitrator "shall have no authority to add to, detract from or alter its express terms." 566 F.2d at 1198. The court held that the arbitrator, having found that the employees violated the no-strike clause, had no authority to vary the action of the company in disciplining them.

Similarly, in *Wright-Austin Co. v. United Automobile Workers*, 422 F.Supp. 1364 (E.D. Mich., 1976), where the contract provided that an employee who was absent three days without notifying the employer would lose his seniority, the court held that the arbitrator could not, after finding a three day absence without notice, restore the employee's seniority.

Likewise, in *General Drivers, etc. Union v. Hays & Nicoulin, Inc.*, 594 F.2d 1093 (6th Cir. 1979), the court held that where the contract provided that the company should be the sole judge of the qualifications of an employee, the arbitrator could not substitute his judgment as to qualifications for that of the company.

The cases which hold that an arbitrator cannot ignore the plain language of a contract and administer his own brand of justice are legion.[7]

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[7] *Detroit Coil Co. v. Int. Assn. of Machinists*, 595 F.2d 575 (6th Cir. 1979); *NF&M Corp. v. United Steelworkers*, 524 F.2d 756 (3rd Cir. 1975); *Storer Broadcasting Co. v. Am. Fed. of TV & Radio Artists*, 600 F.2d 45 (6th Cir. 1979); *Baltimore Regional Joint Board v. Web-*

The decisions cited in footnote 7 all hold that where the parties *have agreed* to clear language, the arbitrator must make the parties *live up to their bargain*, even though he may think another result would be more fair or may think that the facts provide cause for one of the parties to try to avoid observance of the contractual language. An award which fails to do so does not draw its essence from the agreement of the parties.

In the contract between Lodge 709 and Lockheed, Article II, Section 2, (App. Q, 1q-2q).

> * * Business Representatives of the Union *shall* have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and *shall* have access to the departments of the Company's plant to which they are assigned for the purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be subject to such regulations as may be made from time to time by the Company. *The Company shall not impose regulations which will render ineffective the purposes of this Section.* Before entering the Company's plant for the

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ster Clothes, Inc., 596 F.2d 95, 98 (4th Cir. 1979); *Westinghouse Electric Corp. v. IBEW*, 561 F.2d 521 (4th Cir., 1977); *Int. Union of Opr. Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980); *Norfolk & Western Ry. Co. v. Bro. of Ry., etc., Clerks*, 657 F.2d 596, 600, 602-3 (4th Cir. 1981); *Jackson Purchase, etc., v. IBEW Local 816*, 646 F.2d 264, 268 (6th Cir. 1981); *Teamsters Union v. W. Pennsylvania Motor Carriers Asso.*, 574 F.2d 783 (3rd Cir. 1978); *Milwaukee Typographical Union v. Newspapers, Inc.*, 639 F.2d 386, 393, 394 (7th Cir. 1981); *Int. Bro. of Fireman & Oilers v. Nestle Co., Inc.*, 630 F.2d 474 (6th Cir. 1980); *Mistletoe Express Service v. Motor Expressmen's Union*, 443 F.Supp. 1 (D.C. Okla., 1975) aff'd 566 F.2d 692; *Machinists Union v. Olin Mathison Chem. Corp.*, 335 F.Supp. 212 (D.C. Mo. 1971); *Philadelphia Food Stores Emp. Labor Council v. Retail Clerks Union*, 453 F.Supp. 577 (D.C. Pa. 1978); *Nuest v. Westinghouse Air Brake Co.*, 313 F.Supp. 1228 (D.C. Ill. 1970).

> above purpose, the * * * Business Representative *shall* notify the Labor Relations Department of the date and time he will be in the plant, and the name of the Union Steward or Committeeman he will contact. (Emphasis supplied).[8]

The contract also provides in Article III, Section 5. (App. Q, 5q).

> * * * The arbitrator *shall not have the authority to amend or modify this Agreement or to establish new terms and conditions* of this Agreement. (Emphasis supplied.)

Arbitrator Williams found, as a matter of fact, that Business Representative Mason's "ability to fully perform his job as a Business Representative has been hampered to some degree by his lack of access to the plant." (App. B, 8b; also App. F, 4f: "The Company's action rendered the purpose ineffective as to Mason.")

However, notwithstanding the positive dictates and plain language of Article II, Section 2, that Company regulations "shall *not*" "render ineffective" the *guarantee* of access to the plant, the Arbitrator found that the Company did not violate the agreement.

In so doing the Arbitrator modified the plain language of the agreement and administered his own brand of industrial justice; and thereby he demonstrated infidelity to his obligation and vitiated his opinion and award.

The decisions of the District Court setting aside the original award and the supplemental award were therefore in accord with the great body of decisional law, and the Eleventh Circuit's decision reversing the District Court was error.

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[8] Advance notice of the visit provides Lockheed with ample opportunity to supervise the visit without prohibiting it.

II. Certiorari Should Be Granted to Afford Relief to the Union.

The District Court twice, *and correctly*, set aside the arbitration awards which barred Business Representative Mason from access to Lockheed premises. The Union specifically requested the Court to order Lockheed to adhere to the contract and order Lockheed to reissue identification credentials to Mason which would permit him to enter plant premises and carry out his assigned duties. The Court held that he did not have authority to issue an affirmative award. (Appendix H, 1h-2h). That was error.

This case is similar to that presented in *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403 (5th Cir. 1969), *cert. den.* 396 U.S. 1008 (1970). There while the Fifth Circuit noted that the scope of review of an arbitration award "is much narrower than the 'substantial evidence' test affords," it is nevertheless reviewable and is "final and binding" only if it meets the test of judicial review. 415 F.2d, at 411, 412.

There the Court held:

> In the arbitration context, an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction of the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have 'foundation in reason or fact' means that the award must,

> in some logical way, be derived from the wording or purpose of the contract. This Court in Safeway Stores v. American Bakery Workers Local 111, 5 Cir. 1968, 390 F.2d 79, 81, 82, has recently announced the standard for review of an arbitrator's reward: '[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts.' * * * On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' 415 F.2d, at 411, 412.

As the First Circuit said in *IBEW Locals v. New England Telephone & Telegraph Co.*, 628 F.2d 644, 649 (1980):

> To require the Union to invoke the 'time-consuming and burdensome grievance process again' in order that the parties might resolve the remnants of a dispute which has already once traveled that route would seriously undermine the chief policies underlying resort to those procedures in the first instance: the speedy, flexible and inexpensive resolution of labor disputes. *Interpace Corp., supra*, 447 F.Supp. at 392. 'The purpose of arbitration is to resolve disputes, not to create new ones.' *Bell Aerospace Co. v. Local 516*, 500 F.2d 921, 924 (2d Cir. 1974).

The Union has been left without a remedy by the District Court; and resort to arbitration for a third time is not a proper remedy when the federal courts have the primary power *and* responsibility to interpret and enforce labor agreements.

In Section 301 of the Labor Management Relations Act [29 U.S.C., Sec. 185] Congress provided that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

> amount in controversy of without regard to the citizenship of the parties.

This provision "authorizes the federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance . . . [of promises contained in such agreements]." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

Congress thus gave the basic and primary jurisdiction to enforce collective bargaining agreements to the federal courts. That jurisdiction is *as broad as the promises contained in the collective bargaining agreement.* This Court has said:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements.

Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 509 (1962).

The authority exercised by the Courts has been varied, *but it is not limited.* Arbitration agreements have been enforced [see, e.g., *Drake Bakeries v. American Bakery and Confectionery Workers, Local 50*, 350 U.S. 254 (1962)]; and orders to arbitrate have been denied because it is the basic duty of the courts to enforce the provisions of collective bargaining agreements. (See, e.g., *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962)]. The authority

of the courts is governed by the agreement of the parties and the parties are free to make their promises "as broad or as narrow as they wish". *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 569, separate concurring opinions, at 363 U.S. 570 (1960).

By virtue of Section 301, courts have jurisdiction to adjudicate breaches of contract *even though* the breach of contract is also an unfair labor practice over which the National Labor Relations Board has jurisdiction. *Smith v. Evening News Association*, 371 U.S. 195, 197 (1962). "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining agreement is not displaced by § 301, but *it is not* exclusive and does not destroy the jurisdiction of the courts in suits under §301."

While the Supreme Court has held that federal law favors arbitration and that agreements to arbitrate must be exhausted prior to resort to the courts [*Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)], that is a judicial (not statutory) rule for the administration of the law and *does not oust* the courts of their primary jurisdiction and authority. For example, if a union refuses to arbitrate a case, a judicial remedy for breach of contract is available *without exhaustion* of the contractual procedure. *Republic Steel v. Maddox, supra*, 379 U.S. at 652; *Humphrey v. Moore*, 375 U.S. 335; *Smith v. Evening News Association, supra*. The primary jurisdiction of the courts is not ousted by the availability *or use* of arbitration. *Barrentine v. Arkansas Freight System*, 450 U.S. 728, 67 L. Ed. 2d 641 (1981).

The Labor Board has authority to disregard arbitration decisions and award affirmative relief. Why not the courts? The answer is obvious. Courts have jurisdiction to

overrule Labor Board decisions, as well as arbitration decisions, because Congress has given them that power *and that responsibility. Alexander v. Gardner Denver Co.*, 415 U.S. 36, 60 (1970).

As the Second Circuit said in *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, at 176 and 177:

> In any event, such matters of policy must be settled and determined by the Congress. In this case our task is not to fix policy but to interpret the statute and say what we think the Congress intended it to mean. 326 F.2d, at 176.
>
> Were we to support the doctrine thus propounded the power and jurisdiction of the Board would be vastly extended and increased; and it would seem that such jurisdiction would be primary and the courts would be entirely excluded from the adjudication of such cases. That is what makes the case so interesting and important. 326 F.2d, at 177.

Similarly, if the Courts cannot enforce collective bargaining agreements, the jurisdiction given them by Congress is denied.

As was held in *Black-Clawson Co. v. Machinists Union*, 313 F.2d 179 (2nd Cir., 1962),

> By far the great majority of courts, however, read section 301(a) more expansively and permit suits for a declaration of rights in circumstances such as those in the case before us.

After the Union has twice resorted to arbitration and after the District Court has twice properly set aside the arbitrator's awards, there is no legal limitation or logical reason why the Court cannot enforce the contract in accordance with its clear terms and grant the Union the remedy sought in its grievance and in this action. To deny such relief denies the authority granted to federal courts in Section 301.

III. This Case Presents Important Issues Which Are Already Before the Court.

This case presents the same questions as are presented in reverse in *W. R. Grace & Co. v. Rubber Workers Union Local 759*, 652 F.2d 1248 (5th Cir., Unit A, 1981, certiorari granted, No. 81-1314, June 28, 1982.)

In that case the Fifth Circuit held, as did the District Court here, that where a contract provides that an arbitrator "shall have no authority to add to, adjust, change or modify any provisions" of the agreement between the parties, *it means just that* and it is the function of federal courts to enforce the agreement as the parties wrote it. There the first arbitrator ignored the plain terms of the seniority provisions of an agreement and held that, because of a district court decision in a Title VII case, *subsequently reversed by the Fifth Circuit*, it would be inequitable to require the employer to live up to the terms of the agreement and pay back pay to displaced employees. A second arbitrator disagreed. The Fifth Circuit held that *its decision had become the law of the contract and must be followed by the arbitrator* (652 F.2d, at 1254, 1255). Here as in that case, "There is nothing in the contract about the arbitrator balancing the equities or deciding whether something is unfair or not." Here, as in that case, the decision of the arbitrator "departed from the terms of the contract." 652 F.2d at 1255, 1257. Here the District Court in its first decision, acting within its authority, held that the arbitrator had not been faithful to his obligation and it was proper for the Court to set aside the second award which continued to ignore the plain terms of the contract.

This case should in the interest of uniformity of decision be reviewed concurrently with the *Grace* case.

IV. The Standard for Award of Attorney Fees Announced by the Circuit Court Conflicts With Decisions of This Court.

The Eleventh Circuit held that attorney fees may be awarded against the Union if the District Court finds that the Union refused to abide by the arbitrator's award "without justification." That standard is improper and should be corrected. The Union has abided by the arbitrator's awards while challenging their propriety by legal action.

In *Summit Valley Industries v. Carpenters Local Union 112*, 50 U.S.L.W. 4560 (#81-497, 6/1/82), this Court said:

> Under the American Rule it is well-established that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). This Court has endorsed certain exceptions to this rule where necessary to further the interests of justice. See, *e.g.*, *Vaughan v. Atkinson*, 396 U.S. 527 (1962) (bad faith); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (willful disobediance of a court order); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) (common fund). In the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 249-250 (1975); *Arcambel v. Wiseman*, 3 Dall. 306 (1796).

* * *

> As we have often noted, one of the primary justifications for the American Rule is that "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) (emphasis added). See also, *F. D. Rich Co. v. United States ex rel Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964).

50 U.S.L.W. at 4561 (emphasis by the Court).

The standard of "without justification" established by the Eleventh Circuit is broader than "bad faith", and is therefore improper unless those terms are equated by judicial explanation.

Furthermore, the Union has complied with the arbitrator's decision. Representative Mason has not been on Lockheed premises since he was barred by Lockheed on May 3, 1977. All the Union has done is to litigate the propriety of the arbitrator's decision. Under the American Rule, the Union is entitled to do that without liability for attorney fees.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statute and Rule Involved

Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C., § 185 provides as follows:

§ 185. Suits by and against labor organizations

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity

as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

Rule 52 (a), F.R.Civ.P., provides in pertinent part:

. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .